

James A. McDevitt
United States Attorney
Eastern District of Washington
Stephanie J. Lister
Assistant United States Attorney
Post Office Box 1494
Spokane, WA 99210-1494
Telephone: (509) 353-2767

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TIMOTHY SHELLEY,

Defendant.

CR-09-089-WFN

United States's Memorandum
in Opposition to Defendant's
Appeal of Magistrate's Order
of Detention

Plaintiff United States of America, by and through James A. McDevitt,
United States Attorney for the Eastern District of Washington, and Stephanie
Lister, Assistant United States Attorney for the Eastern District of Washington,
submits the following memorandum in support of the United States' Opposition to
Defendant's Notice of Appeal of the Order of Magistrate Judge Imbrogno, dated
September 21, 2009, ordering the above Defendant be detained.

I. STATEMENT OF CASE

On June 23, 2009, the Defendant was charged by Indictment with three
counts of federal criminal offenses involving the sexual exploitation of a minor.
The first count charges Defendant with Coercion of a Minor, which carries a
penalty of not less than 10 years up to life, in violation of 18 U.S.C. § 2422(b).
The second count charges Defendant with Production of Child Pornography,
which carries a mandatory minimum penalty of not less than 15 years
imprisonment or more than 30 years, in violation of 18 U.S.C. § 2251(a). The
third count charges Defendant with Travel with Intent to Have Sex with a Minor,

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1 which carries a maximum penalty of not more than 30 years imprisonment, in
2 violation of 18 U.S.C. § 2423(b).

3 On July 24, 2009, the Defendant was arrested in the District of Michigan
4 and was ordered transferred back to the Eastern District of Washington on July 27,
5 2009. On August 20, 2009, the Defendant had his initial appearance before
6 Magistrate Judge Imbrogno, and the United States moved to detain the Defendant
7 pursuant to 18 U.S.C. §§ 3142(e). On August 25, 2009, Magistrate Judge
8 Imbrogno conducted a bail hearing, the Government proffered the Pretrial
9 Services report from the District of Michigan, and moved for the continued
10 detention of the Defendant. Defense counsel had no objection to the Pretrial
11 Services report from Michigan. The Court concluded that the Government had
12 met its burden. The Court directed the USPO to prepare a Supplemental Pretrial
13 Services report regarding residence matters in the District of Michigan and
14 indicated the matter could be revisited on a Motion to Modify. Defendant was
15 detained.

16 Defendant filed a Motion for Reconsideration of Pretrial Detention on
17 September 14, 2009. The Court heard Defendant's Motion for Reconsideration on
18 September 18, 2009, and after taking the matter under advisement, detained
19 Defendant. The Court stated in its Order:

20 Defendant's proffered residence plan is to reside with his sister, where
21 minor children also reside. Defendant's sister represents that she will not
22 leave her children alone with Defendant while he resides with her, and that
23 she would have her sister, niece or neighbors available for childcare when
24 she has to run errands. The undersigned is unable to conclude the residence
25 plan has sufficient structure.

26 (Ct. Rec.26). Thus, the Defendant was detained.

1 Although no new relevant evidence has since been provided, Defendant
2 moves this Court for revocation of the Magistrate Judge's Order. Defendant
3 suggests the residence plan submitted to the Magistrate Judge is sufficient and
4 Defendant complains that the Government did not seek an Indictment until 2009,
5 when Defendant's criminal conduct took place in 2005, which must somehow
6 justify Defendant's release into the community.

7 The Government submits the Defendant was properly detained and that no
8 condition or combination of conditions would reasonably assure the safety of any
9 other person or the community. Furthermore, the United States submits that a
10 delay in the charging of this case does not justify the Defendant's release.
11 Moreover, evidence discovered during the investigation of the Defendant,
12 indicates that as recently as January of 2008 the Defendant was still
13 misrepresenting his true age on his Internet myspace page.

14 **II. FACTS**

15 The United States intends to provide the following evidence during the
16 appeal:

17 On September 8, 2005, Detective J.R. Sharp of the Ferry County Sheriff's
18 Department was contacted by Detective Heck of the Wyandotte Police Department
19 located in Wyandotte, Michigan regarding the alleged sexual molestation of a 13
20 year old female residing in the City of Republic, Washington (located in Ferry
21 County). Specifically, Detective Heck informed that he had been contacted by
22 Brenda Shelly, who reported that her husband at the time, Timothy Shelly, (they
23 are now divorced) had been communicating on the Internet with a 13 year female
24 in the Republic, Washington area and that Timothy Shelly flew to Washington to
25 visit the 13 year old female over the labor day weekend in 2005 and planned to
26 have sex with the female minor during such visit. Brenda Shelly also stated that
27 she had found numerous e-mails and images of a young girl on her home

1 computer. Brenda Shelly believed these images to be of the same female Timothy
2 Shelly had visited in Washington in 2005. Brenda Shelly provided Defendant's
3 computer to law enforcement for examination.

4 On September 12, 2005, Detective Sharp contacted the parents of the minor
5 victim. The parents of the minor informed Detective Sharp that they were aware
6 of a Tim Shelly, but believed him to be the teenage boyfriend of their daughter,
7 not a 42 year old man. The parents of the minor provided consent for law
8 enforcement to take their two home computers and review them. The father of the
9 minor asked his daughter if Timothy Shelly had visited her over the Labor Day
10 weekend in 2005, to which she replied that he had. The minor admitted to
11 having contact with Timothy Shelly, but said that they only kissed. The minor
12 stated that in approximately January of 2005, while she was chatting on line with a
13 friend, Shelly had send her an instant message on Yahoo and that they then began
14 communicating on line. Initially Shelly provided a false name and age. She
15 indicated Shelly had sent her some candles, stuffed animals, a CD player, two
16 rings and a bracelet, and cell phones. She also indicated that she had emailed
17 images of herself to Shelly at his request.

18 On November 15, 2005, the mother of the minor contacted Detective Sharp
19 and informed that Timothy Shelly had sent the female minor another cell phone
20 hidden in a stuffed animal. The mother also informed Detective Sharp that she
21 had overheard a conversation between her daughter and Timothy Shelly, in which
22 they discussed engaging in sexual relations when he had visited her in September
23 of 2005. The minor was re-interviewed by Detective Sharp and admitted that
24 when Timothy Shelly had visited her, she had "sucked" his penis and he had
25 placed his fingers inside her vagina.

1 Detective Sharp, thereafter, forwarded the matter to the Spokane FBI Office
2 for further investigation. Detective Sharp provided the Spokane FBI Office with
3 the two computers from the residence of the minor for analysis.

4 Unfortunately, due to a number of events, staffing and resources issues, FBI
5 Special Agent Loza was not assigned to this case until April of 2007. Prior to that
6 the minor and her mother had moved out of state and the FBI was unable to locate
7 the victim in April of 2007. In January of 2008, SA Loza did locate the victim and
8 interviewed her on January 10, 2008. The minor victim confirmed that Timothy
9 Shelly had flown from Michigan to Washington and visited her over the Labor
10 Day weekend in 2005. The minor also confirmed that they engaged in oral sex on
11 two separate occasions during this weekend.

12 Also in January of 2008, SA Loza located the Defendant's myspace page,
13 by using his email address trusken_one@yahoo.com which he had used when
14 contacting the minor victim and determined that Defendant was still
15 misrepresenting himself to be a 22 or 23 year old male (Defendant's date of birth
16 is 10/12/63).

17 Additional computer forensic requests were made by SA Loza.
18 Also SA Loza did further investigation which corroborated Defendant's travel to
19 Spokane from Detroit, Michigan on labor day weekend in 2005. Frontier Airline
20 records revealed that a Timothy Shelly traveled on September 1, 2005 from
21 Detroit, Michigan to Spokane, Washington and returned from Spokane,
22 Washington to Detroit, Michigan on September 4, 2005. Also, Enterprise records
23 revealed that a Timothy Shelly rented a vehicle in Spokane on September 1, 2005
24 through September 4, 2005. The records also revealed that Timothy Shelly
25 provided his residence as 512 Goddard Street, Wyandotte, Michigan (one of the
26 addresses included on the Supplemental Pretrial Service Report dated 9/1//2009).
27 On October 15, 2008, the owner of the Northern Inn located in Republic,
28

1 Washington, identified a Michigan State Driver's License picture of Timothy
2 Shelly. The manager explained that on Labor Day weekend in 2005, Timothy
3 Shelly stayed at the Inn for two days, September 1 and 2, 2005. On the third night,
4 the manager informed Shelly that the Inn was full. On the registration card for the
5 Northern Inn, Timothy Shelly provided his address as 512 Goddard, Wyandotte,
6 Michigan.

7 A forensic analysis was performed by the FBI Seattle CART on the
8 Defendant's computer and the two computers obtained from the victims residence.
9 The forensic analysis revealed numerous e-mails and chat sessions between
10 Timothy Shelly and the minor victim on the computer hard drives. The first chat
11 recovered is dated April 16, 2005 and the last chat recovered was on September 7,
12 2005. The forensic analysis also revealed thousands of images of the victim on
13 the Defendant's computer. The minor was naked in many of these images and her
14 vaginal area was exposed in over 700 of these images. Some of these images
15 depicted the minor inserting an object inside her vagina. Over 700 images of the
16 minor are child pornography as defined by federal law.

17 This case was submitted to the U.S. Attorney's Office for prosecution in
18 approximately January 2009. Defendant was indicted on June 23, 2009.

19 Defendant was arrested on July 24, 2009 and at that time was asked about
20 his email address. Defendant provided the same email that SA Loza had used to
21 locate his myspace page: trusken_one@yahoo.com. Defendant also advised law
22 enforcement at the time of his arrest that he could not recall the age of his myspace
23 profile.

II. LEGAL AUTHORITY

A. Rebuttable Presumption Supports Detention under § 3142(e).

The United States has moved for detention in this case pursuant to 18 U.S.C. § 3142 (e) and (f) which provides in pertinent part:

The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of the person as required ...-(1) upon motion of the attorney for the Government, in a case that involves . . .

(A) *a crime of violence*, or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is proscribed.

Id., (emphasis added).

A “crime of violence” is defined at 18 U.S. C. § 3156(a)(4):

(A) an offense that has [as] an element of the offense that the use, attempted use, or threatened use of physical force against the person or property of another; or

(B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or . . .

(C) Any felony under chapter 109A [sexual abuse], 110 [sexual exploitation of children], or 117 [transportation for illegal sexual activity]; [sic]

Under 18 U.S.C. § 3142(e) a defendant may be ordered detained pending trial if the Court finds one of the following three conditions to be true: (1) no condition or combination of conditions will reasonably assure the safety of any other person or the community. . . ; (2) no condition or combination of conditions will reasonably assure the appearance of the defendant; or (3) there is a serious risk the defendant will flee. Further, 18 U.S.C. 3142(e) provides that “*it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person*

1 committed an offense . . . involving a minor victim under section 2251 [or]
2 2423.”

3 The rebuttable presumption in 3142(e) shifts to the defendant the burden of
4 producing evidence that the defendant is not a flight risk and not a danger to the
5 community. See U.S. v Portes, 786 F.2d 758 (7th Cir. 1985). Even if the
6 defendant presents contrary evidence, the Court should weigh the presumption in
7 favor of pretrial detention as one of the factors to be considered along with those
8 set forth in 3142(g). Id. (“[rebuttable presumption] remains in the case as an
9 evidentiary finding militating against release, to be weighted along with other
10 evidence relevant to factors listed in §3142(g)”).

11
12 **B. Factors in Support of Detention under § 3142(g).**

13 The Bail Reform Act of 1984, as amended in 1986 and 1988, determines the
14 conditions under which bail is available. 18 U.S.C. §§ 3141-3142. The statute
15 specifies four factors to be considered in determining whether there are conditions
16 of release that will reasonably assure the appearance of the person and the safety
17 of the community. 18 U.S.C. § 3142(g). These factors are: **(1)** the nature and
18 circumstance of the offense charged, including whether the offense is a crime of
19 violence or involves a narcotic drug; **(2)** the weight of the evidence against the
20 defendant; **(3)** the history and characteristics of the defendant, including his
21 character, physical and mental condition, family ties, past conduct, history relating
22 to drug and alcohol abuse, criminal history, and record concerning appearance at
23 court proceedings; and **(4)** the nature and seriousness of the danger to any person
24 or the community that would be posed by the defendant's release. Id.; Motamedi,
25 767 F.2d at 1407.

1 If, after a hearing, the court determines that no condition or combination of
2 conditions will reasonably assure the safety of the community, the court is to order
3 the Defendant's detention. 18 U.S.C. § 3142(e).

4 **(1) The Nature and Circumstance of the Offense Charged: A crime of**
5 **violence (child sexual exploitation):**

6 The offenses that are alleged by Indictment are violent offenses. Defendant
7 has sexually molested a minor child, requested and taken sexually explicit
8 photographs of this same minor being sexually exploited.

9 **(2) The Weight of the Evidence Against the Defendant:**

10 The weight of evidence against the Defendant is substantial. The minor
11 victim in this case has disclosed that Defendant sexually molested her. The
12 minor's disclosure of molestation by the Defendant have been confirmed by
13 sexually explicit photographs found on the Defendant's computer and email chat's
14 on the victim and Defendant's computer. Over 700 child pornography images of
15 the minor Defendant sexually molested that have been found on Defendant's
16 computer.

17 **(3) The History and Characteristics of the Defendant(s), including**
18 **Character, Physical and Mental Condition, Family Ties, Past**
19 **Conduct, History Relating to Drug and Alcohol abuse, Criminal**
20 **History, and Record Concerning Appearance at Court**
21 **Proceedings:**

22 Defendant molested a minor in 2005, initially representing himself to be a
23 young man in his early 20's. He continued to misrepresent his age on his Myspace
24 page as recently as January of 2008. According to the Supplemental Pretrial
25 Service Report dated September 11, 2009, Defendant has a recent history of illicit
26 drug use based upon a urinalysis that tested positive for marijuana. However,
27 when Defendant was interviewed by the pretrial service officer in the Eastern
28 District of Michigan he denied any history of substance abuse.

1 **(4) The Nature and Seriousness of the Danger to Any Person or the**
2 **Community that Would be Posed by the Defendants Release:**

3 Child pornography offenses are, by their very nature, crimes of violence.
4 There is at least one identified minor that has been victimized by Defendant's
5 conduct. Thus, the Defendant poses a very real threat to the safety of his victim
6 and to other minors with whom he may come into contact if not detained pre-trial.

7 The Supplemental Pretrial Services Report also found that Defendant is a
8 risk of danger to the community based on:

- 9 • Release plans place defendant in immediate proximity to minor
- 10 children
- 11 • Information indicating a recent history of illicit drug use
- 12 • Nature of the offense

13 The Pretrial Service Report concluded: ..."it appears that no condition or
14 combination of conditions can be imposed by the Court that would reasonably
15 assure the defendant's appearance in Court and the safety of the community.
16 Therefore, detention of the defendant is recommended pending adjudication of the
17 matter." (PSR pg.3).

18 **III. CONCLUSION**

19 The United States contends that both standards for detention are met in the
20 instant case. First, the rebuttable presumption exists supporting Defendant's pre-
21 trial detention, which Defendant has not overcome. Second, detention is proper as
22 a safety issue is shown here by clear and convincing evidence. Therefore, the
23 United States respectfully requests that the court find that there is no condition or
24 set of conditions that can assure the safety of the community and others, and that

1 the Defendant be detained until the final resolution of the pending sexual
2 exploitation charges.

3 DATED October 6, 2009.

4 James A. McDevitt
5 United States Attorney

6 *s/ Stephanie J. Lister*

7 Stephanie J. Lister
8 Assistant United States Attorney

9 I hereby certify that on October 6, 2009, I electronically filed the foregoing
10 with the Clerk of the Court using the CM/ECF System which will send
11 notification of such filing to the following, and/or I hereby certify that I have
12 mailed by United States Postal Service the document to the following non-
13 CM/ECF participant(s):

14
15 Amy H. Rubin
16 Federal Defenders
17 10 North Post
Suite 700
Spokane, WA 99201

18 *s/Stephanie J. Lister*

19 Stephanie J. Lister
20 Assistant United States Attorney